United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76 - 4151
76 - 4153

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION
ON REHEARING EN BANC
PURSUANT TO ORDER OF FEBRUARY 15, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Greene County Planning Board, et al.
Town of Durham, et al.
Petitioners,

v.

Federal Power Commission,
Respondent,

Power Authority of the State of New York,
United Brotherhood of Electrical Workers Local 1249,
Intervenors.

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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MARCH 22, 1977

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On Rehearing En Banc Pursuant
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ISSUE

Whether the Federal Power Commission is authorized to reimburse the Petitioners for counsel fees and expenses.

REFERENCE TO RULINGS

Under review herein are three Commission orders in Power Authority of the State of New York, Project No. 2685: Opinion No. 751, "Opinion and Order Affirming and Adopting Initial Decision Authorizing Construction of Proposed Gilboa-Leeds Transmission Line," issued January 29, 1976; Opinion No. 751-A, "Opinion and Order Denying Rehearing, Reopening and Stay," issued April 27, 1976; and "Order Denying Rehearing With Respect to Reopening and Stay," issued June 7, 1976.

On December 8, 1976, a panel of this Court affirmed the Commission's orders in all respects save the instant issue, which was remanded to the Commission for further consideration. On January 5, 1977, the Commission sought rehearing of the Court's decision on this issue and suggested rehearing en banc. On February 15, 1977, the Court granted rehearing en banc.

Previous decisions by this Court relating to this case are Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972) (Greene County I); Greene County Planning Board v. FPC, 490 F.2d 256 (2d Cir. 1973) (Greene County II); and Greene County Planning Board v. FPC, 528 F.2d 38 (2d Cir. 1975) (Greene County III).

STATEMENT OF THE CASE

This case involves the Commission's approval of the location of a transmission line leading from the Power Authority of the State of New York's (PASNY's) Blenheim-Gilboa Pumped Storage Project, FPC No. 2685, located in the towns of Blenheim and Gilboa, New York, to a sub-station near Leeds, New York.

Hearings involving alternative routes for the Gilboa-Leeds line commenced in 1971. Parties to the proceeding included the instant petitioners, Greene County Planning Board and the Town of Greenville (Greene County), and the Town of Durham and Association for the Preservation of Durham Valley (Durham). Intervention was granted to these parties on the basis of their complaints that the Gilboa-Leeds line would pass through Durham Valley and other parts of Greene County.

Hearings on the routing of the transmission line were interrupted by an appeal to this Court, Greene County Planning Board v. FPC (Greene County I), 455 F.2d 412 (2d Cir), cert. denied, 409 U.S. 849 (1972). Among the issues decided in Greene County I was whether PASNY, or in the alternative the Commission, should be required to pay the expenses and fees incurred by intervenors in this proceeding. The Court found no authority in the Federal Power Act to award such relief, stating (455 F.2d at 426):

> /W/e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clear congressional mandate we should not order the Commission or PASNY to pay the expenses or fees of petitioners, either as they are incurred or at the close of the proceedings. *** We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances to provide for them when to do so was in the public interest.

Further hearings in this proceeding were held in 1973, at which petitioners renewed their requests that PASNY or the Commission pay their fees and expenses. The Commission denied the requests in Opinion No. 751, issued on January 29, 1976. The Commission gave two independent grounds for its decision. First, relying on Greene County I and the United States Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Commission found that it had no authority to award fees and expenses. Second, in the words of the Commission:

> The intervenors represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas ***. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its rate payers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

The Durham petitioners sought review in this Court of the Commission's decision on the fees issue. 1/ Durham relied on a decision issued by the Comptroller General of the United States dated February 19, 1976, which, in response to a request of the Nuclear Regulatory Commission (NRC), advised that in the opinion of the Comptroller General the NRC could use appropriated funds to pay the expenses of indigent intervenors. Durham also relied upon a subsequent letter from the Comptroller General to the Chairman of the House Oversight and Investigations subcommittee written in response to the Chairman's inquiry as to whether the rationale of the NRC decision was also applicable to other agencies, among them the Federal Power Commission. The Comptroller General stated:

> Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. ***
>
> We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency.

1/ The Greene County petitioners joined with Durham's brief on the fees and expenses issue, without making argument on the issue or citing facts that would justify an award.

On December 8, 1976, this Court issued its decision. The majority found that "the Comptroller General is Congress' agent for the purpose of determining the legality of administrative expenditures" (slip op. 827). Reasoning that public hearings are integral to the Commission's function, the majority found Section 2 of the Act, 16 U.S.C. §793, 2/ to be authority for Commission reimbursement of indigent intervenors in light of the Comptroller General's decision, which, the majority stated, "is not clearly incorrect" (slip op. 827-28).

As to the Commission's second ground for denying petitioners' requests for reimbursement, the majority said (slip op. 828):

> [W]e have some doubts about the fairness of withholding funds from these particular petitioners. *** Although the Durham intervenors were acting in their own interests, they were at the same time serving the broader public interest in the preservation of unspoiled scenic countryside. They seem to have played an essential role in the proceedings ***. Thus, the Commission was substantially aided in making its determination by the action of the intervenors.

Judge Van Graafeiland dissented from the majority's decision on the fees and expenses issue. Noting this Court's review of the Commission's statutory authority in Greene County I, Judge Van Graafeiland emphasized the

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2/ That Section provides in part:
"The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government for law books, periodicals, and books of references and for printing and binding as are necessary to execute its functions."

impropriety of the majority's reliance on the contrary interpretation of the Comptroller General as authority that the Commission be required to reimburse the Durham petitioners (slip op. 830). The judge argued that (slip op. 831):

> The Federal Power Commission has never deemed itself authorized to pay the legal fees of private litigants, and, a fortiori, has made no request of Congress for an appropriation to pay these fees. Authorization for this payment must come from Congress, Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975); it cannot be derived from a letter of the Comptroller General addressed to the chairman of a congressional committee.

Finally, Judge Van Graafeiland noted that the Comptroller General's opinion itself cautions "that only the administrative agency involved can make the determination as to whether payment of the expenses of indigent intervenors is appropriate." Pointing to the Commission's determination that it should not reimburse parties protecting their own interests, the judge argued that the Court "should not require the Commission to reconsider its discretionary determination merely because we have some doubts about its fairness" (slip op. 833).

ARGUMENT

In this proceeding the Commission held that it has no authority under the Federal Power Act to make an award of fees and expenses to intervenors. We submit that the majority's basis for reversing Commission's holding is incorrect, for the reasons stated below.

I. The Decision of the Comptroller General Does Not Provide the Requisite Statutory Authority to Award Fees and Expenses.

The majority's holding that the Commission has authority to award fees to intervenors rests upon an opinion of the Comptroller General construing the Atomic Energy and Energy Reorganization Acts at the behest of the Nuclear Regulatory Commission (NRC). The majority also cites a subsequent letter to the Chairman of the House Oversight and Investigations Subcommittee. In that letter, on the basis of an examination of "some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held," the Comptroller concluded that there is no significant difference between the authority of the Commission and of the NRC. 3/

3/ In his review of statutes pursuant to the Subcommittee Chairman's request, the Comptroller apparently overlooked a statutory provision of within his own area of regulatory concern. Thus, while the NRC decision and subsequent letter contemplate a grant of financial assistance to intervenors at the outset of a proceeding - where the agency finds that participation of the intervenors is essential to a proper decision - the Comptroller's September 22, 1976 letter to Congressman William Clay (Durham Br. App. C) belatedly notes that 31 U.S.C. §529 (1970) prohibits cash advances unless specifically authorized by statute.

There exists, however, a fundamental difference between the NRC's organic statutes and Part I of the Federal Power Act, here being construed, that renders the Comptroller General's basic rationale for finding the authority to grant fees and expenses inapposite when applied to the statute involved here.

Section 10(e) of the Federal Power Act, 16 U.S.C. §803(e), provides, in relevant part, that all hydroelectric licenses issued by the Commission are subject to the condition that

> *** the licensee shall pay the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part ***.

Hydroelectric regulation by the Commission is self-sustaining, and the administrative costs of such regulation are borne directly by the Commission's licensees. 4/ Thus, each year the Commission recovers the bulk of the previous fiscal year's administrative costs from licensees through annual charges. See, e.g., Hearings on Public Works for Water and Power Development and Energy Research Development before the Senate Comm. on Appropriations, 94th Cong. 2d Sess., pt. 4, at 3498,

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4/ There are exceptions not relevant here: licensees of minor projects, and certain State and municipal licensees for which partial exemption from payment of annual charges for costs of administration have been granted by the Commission. See 18 C.F.R. §§11.23, 11.24 (1976).

3506 (1976). Payment by the Commission of fees and expenses to intervenors would be a cost of administration of Part I of the Act. 5/

A Commission award, therefore, of fees and expenses to intervenors in licensing proceedings would be a cost borne by the licensees themselves. Such an award would run directly afoul of the United States Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In Alyeska, relied upon by the Commission in the orders under review, the Supreme Court reversed the Court of Appeals' award of fees to litigants that that Court determined had acted as private attorneys general in vindicating important public interests. Characterizing the redistribution of litigation costs as a matter within the legislature's province, id. at 271, the Court held that absent specific statutory authorization, it would be inappropriate for the Courts to reallocate the burdens of litigation. Id. at 247.

Citing Alyeska, the majority in the instant decision stated (slip op. p. 827):

5/ The majority cites Section 2 of Part I of the Act, 16 U.S.C. §793, as the Commission's authority for such payment.

> Although express statutory authorization is required before either a court or a regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest /citations omitted/, the Comptroller General has concluded that fee reimbursement is distinguishable from fee shifting because it involves no exercise of compulsion against a private party.

Even granting the validity of the Comptroller General's distinction between fee reimbursement and fee shifting, the distinction is of no relevance in the instant case because fee shifting is precisely what is involved here. If, for example, the Durham petitioners were reimbursed by the Commission in the manner suggested by the majority (slip op. p. 828 n. 5), the costs would eventually be paid to the United States by State and municipal licensees 6/ in the proportion that the total authorized installed capacity of each licensee's projects bears to the total installed capacity of all projects of all such licensees. 18 C.F.R. §11.20(b)(2),(3)(1976). The holding of Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975), is thus directly on point. In Turner, the court found Alyeska controlling in its review of a decision by the FCC that it had no authority to require a license applicant to reimburse the fees

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6/ PASNY is a "municipality" as defined in Section 3(7) of the Act, 16 U.S.C. §796(7). The Commission provides different criteria for the assessment of annual charges for State and municipal licensees on the one hand, and all other licensees on the other. See 18 C.F.R. §11.20 (1976).

of intervenors. The court found that the reasoning of Alyeska (514 F.2d at 1356):

> ***is fully applicable to litigation before the Federal Communications Commission. Congress has no more delegated a "roving commission" to the FCC than it has to the Judiciary to allow counsel fees as costs or otherwise whenever the /Commission/ might deem them warranted.

Durham attempts to distinguish the fee-shifting at issue here from that which the Supreme Court found prohibited in Alyeska by stating that in realty, fee shifting is not involved, presumably because the Commission has not shown that the cost to each licensee would be substantial (Durham p. 35). Leaving aside the question why the Commission should be required to make such a showing, the "American Rule" reaffirmed in Alyeska does not derive its vitality from the amount of fees and expenses sought to be awarded. Moreover, the policy considerations underlying the decision are applicable to any question of fee-shifting, whether from the prevailing litigant to another party or, as here, to a class of persons not even involved in the litigation.7/

7/ In a footnote (Durham, p. 35), Durham refers to the Commission's $41 million appropriation, implying, we assume, that (1) the Commission could use that appropriation for any purpose, including the payment of intervenor's fees, and (2) such a vast sum would easily allow support of intervenor-litigants. To place Durham's observation in perspective, we note that the Commission each year presents to Congress, and must justify, a detailed budget. See Hearings, p. 9, at 3486-3623. In 1974 the total cost of administering Part I of the Act was approximately $4.3 million, of which $4.2 million was recovered through annual charges.

Durham also suggests (Durham pp. 35-36) that even assuming the instant case involves fee-shifting, Alyeska's reaffirmation of the "general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees", 421 U.S. at 257, does not preclude an award by the Commission. Referring to the quoted language, Durham first states that the Federal Power Act mandates fee-shifting, and that therefore Alyeska is not involved; this, of course, is the question before this Court, and Durham's circular argument assumes a decision in its favor. 8/ Second, Durham reasons that hydroelectric licenses are "in the nature of" contracts between the Commission and its licensees, providing for the payment of administrative costs, and that Alyeska is inapposite for that reason also. While the Court in Alyeska suggested that "enforceable contracts" might be the basis for one party's payment of another's fees (421 U.S. at 257), the "contracts" to which it referred were contracts that specifically provide for the payment of litigation or other expenses. Cf. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 126 (1974) ("There was no contractual provision concerning attorney's fees in this case."); Office of Communications of United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972).

Durham's attempt to differentiate the fee-shifting of this case from that prescribed by Alyeska is unavailing.

8/ The Court in Alyeska listed those statutory provisions that specifically and explicitly allow fees. 421 U.S. at 260, n. 2.

II. The Commission Properly Found That The Federal Power Act Contains No Authority For An Award Of Fees And Expenses.

Durham's brief offers extensive argument on the correctness of the Comptroller General's decision. The argument might be appropriate were the Comptroller General's opinion under review by this Court, or even had the Comptroller General specifically addressed the Federal Power Act; neither is the case. Rather, orders of the Commission interpreting its organic statute are here under review.

The majority also focussed on the Comptroller General's decision, finding (slip op. pp. 827-28) that "the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses" /footnote omitted/. At a stroke, the majority thus found the Comptroller General's decision to have superseded the judgment of this Commission, to have overruled the decision of this Court in Greene County I, and to have been the equivalent of an Act of Congress. The Commission submits that such reliance on the decision is misplaced.

A. The Interpretation Of The Act By The Commission Is Reasonable And Should Be Affirmed.

When first presented with petitioners' request for an award of fees and expenses in this proceeding, the Commission held that it lacked the statutory authority to make such an award, whether by requiring PASNY to pay the fees, or by paying

the fees itself. This determination was affirmed by this Court in Greene County I and reiterated by the Commission in the opinions under review.

This interpretation given the Act by the Commission, the agency charged with its administration, is entitled to great deference by the Courts. Udall v. Tallman, 380 U.S. 1, 16 (1965); cf. Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 409-410 (1975). The reviewing court should not substitute its judgment for that of the Commission, if the Commission's interpretation is reasonable. Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1975); Alabama Power Co. v. FPC, 482 F.2d 1208, 1221 (5th Cir. 1973).

Here the majority has not found the Commission's interpretation of its statutory authority to be unreasonable; rather, it has found (slip op. pp. 827-28) that the Comptroller General's decision is "not clearly incorrect." This conclusion does not form an adequate basis for reversal of the Commission's interpretation of the Act.

B. The Prior Opinion Of This Court Should Not Be Overruled.

The majority appears to have construed the Comptroller General's opinion as overruling this Court's prior holding in Greene County I. In that case, the Court said (455 F.2d at 426):

> /W/e find ourselves in agreement with the Commission's position at this posture of the proceeding and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings.
>
> ***/W/e perceive no basis in the terms of the provisions to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them. ***

The Court found no authority in the Act for an award, particularly in view of the numerous situations in which Congress had specifically provided for awards of attorneys' fees and/or expenses.

Durham argues (Durham pp. 38-39) that the Court in Greene County I did not finally dispose of the instant issue, but merely reserved decision on the question pending further developments.

It is clear from Greene County I that the Court believed that specific statutory authority is necessary for an award of fees and expenses. Subsequent events serve to reinforce the Court's decision not to order PASNY or the Commission to reimburse petitioners. Alyeska, for example, affirmed the general

rule that the courts would not order payment of fees unless specifically authorized by statute. 421 U.S. at 249-50. And to the extent that the Court in Greene County I awaited future developments, such activity has taken place, and is taking place, in the Congress, 9/ which the Supreme Court in Alyeska and the Commission in this case found to be the proper agency to authorize awards of fees and expenses.

C. The Comptroller General's Decision Binds The Comptroller General, But Not This Commission Nor This Court.

The Comptroller General's decision is not an act of Congress to which this Court must bow nor is it a "far clearer congressional mandate" which justifies abandoning Greene County I. The precise effect of the Comptroller General's decision is that the General Accounting Office, in passing upon the accounts of the NRC, cannot question any

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9/ Several bills were introduced in the 94th Congress to provide financial assistance to agency intervenors, e.g., S. 2715, 94th Cong., 2d Sess. (1976), but not acted upon prior to adjournment.

Similar legislation has been introduced in the current session of Congress. E.g., S. 270, 95th Cong., 1st Sess. (1977) (Sen. Kennedy and others); H.R. 3361, 95th Cong. 1st Sess. (1977) (Rep. Rodino and others). These bills would, inter alia, appropriate money for agency participation by intervenors subject to specific qualifications.

disbursements made by the NRC pursuant to the decision. 31 U.S.C. §74. As Judge Van Graafeiland points out, the Commission has never applied for a decision by the Comptroller on this question, and the Comptroller did not request the views or comments of the Commission prior to the letter sent to the Oversight and Investigations Subcommittee Chairman. Moreover, the statute relied upon by the majority in its finding that the Comptroller General is Congress' agent for the purpose of determining the legality of administrative expenditures, 31 U.S.C. §65(d), is merely a general declaration of congressional policy that sound financial and accounting procedures throughout the Federal government be the goal of auditing by the Comptroller. Surely the statute does not delegate to the Comptroller the authority to bind the Congress, the Courts, and administrative agencies by the mere act of rendering an opinion at the request of a sister agency.

III. The Commission's Decision In This Matter Of Policy Should Not Be Disturbed.

Generally, the courts have no authority to concern themselves with the policies of the Commission. Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 612 (2nd Cir. 1965). Even if the Comptroller General's conclusion as to this Commission's authority to award expenses were binding on this

Court, the Commission submits that the majority has improperly construed the Comptroller General's opinion so as to displace the Commission's discretion in a matter of policy.

The Comptroller General stated:

> The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.

The NRC itself, the agency that originally requested the Comptroller General's advice respecting its authority to provide financial assistance to intervenors, has decided as a matter of policy that it will not initiate a program to provide funding to participants in its licensing, enforcement, and antitrust proceedings. Statement of Considerations Terminating Rulemaking, Financial Assistance to Participants in Commission Proceedings, 41 Fed. Reg. 50829 (November 18, 1976). The NRC accepted the Comptroller General's statement of its legal authority, finding that his opinion is entitled to "substantial deference." 41 Fed. Reg. at 20830. Nevertheless, the NRC went on to state (41 Fed. Reg. at 20831):

> The institutional role of Congress in resolving the funding question must be respected. Funding involves the direct transfer of public money to support a private viewpoint; a viewpoint which is not subject to control or oversight by the public's elected representatives and which may or may not reflect the views of many members of the public.

> ***From our perspective, we lack not only the statutory authority to provide funding, but we also find, as a policy matter, that a non-elected regulatory Commission is not the proper institution to expend public funds in this fashion absent express Congressional authorization. /Emphasis added./

The considerations noted by the NRC are the more compelling in the instant statutory context, where private (licensee) funds would be used to support the private interests of intervenors, without discernible benefit to the licensees or to their ratepayers. Cf. FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); National Cable Television Assn. v. United States, 415 U.S. 336, 340-42 (1974).

In Opinion No. 751, here under review, the Commission expressed concern over considerations identical to those raised by the NRC (R. 7319):

> If /fees and expenses/ were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

The Majority's finding (slip op. p. 829) that "there is a good chance that the Durham intervenors may meet the standards approved by the Comptroller General" and remand for the Commission's consideration in light of those standards effectively preempt the Commission's discretion in this important question of policy.

CONCLUSION

For the foregoing reasons, the December 8, 1976 decision of the majority on this question should be vacated, and the orders of the Commission should be affirmed.

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